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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 31

BENJAMIN W. COREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 19–20) is reported at 307 F. 2d 839.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1962 (R. 21). A petition for rehearing was denied on October 3, 1962 (R. 23). The petition for a writ of certiorari was filed on November 2, 1962, and was granted on January 21, 1963 (R. 24). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the procedure established by 18 U.S.C. 4208(b), the time for appeal ran from the original commitment (which under the statute is for the maximum sentence) or from the time when the sentence was reduced to probation.

STATUTE INVOLVED

18 U.S.C. 4208 provides:

> § 4208. *Fixing eligibility for parole at time of sentencing.*
>
> (a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.
>
> (b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment

prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

(c) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsection (a), the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation as it may deem necessary.

It shall be the duty of the various probation officers and government bureaus and agencies to furnish the board of parole information concerning the prisoner, and, whenever not incompatible with the public interest, their views and recommendations with respect to the parole disposition of his case.

STATEMENT

Petitioner was convicted by a jury in the District of Massachusetts on 75 counts charging the making of false claims against the government in violation of 18 U.S.C. 287 (R. 9–11).

On March 26, 1962, the matter came on for sentencing (R. 1). Petitioner's counsel outlined his client's background, which included graduation from Harvard Law School and service in World War II and the Korean War (R. 2). He presented the testimony of a psychiatrist from the Veterans Administration, where petitioner had been hospitalized since his conviction (R. 3–4). It was the doctor's opinion that petitioner needed psychotherapy for a minimum of one or two years, but that this could be obtained without further hospitalization, and that incarceration would serve no purpose (R. 3–6). The trial judge stated that, in the light of these circumstances and in the absence of a full probation report, he would postpone the matter and await a complete probation report and a transcript of the psychiatrist's testimony (R. 6).

On April 9, 1962, a further hearing was had. The government recommended using the procedures prescribed by 18 U.S.C. 4208(b) (R. 7). Petitioner's counsel argued against following that course and

suggested that it would be appropriate to suspend sentence and allow petitioner to continue his present treatment under the supervision of the probation office (R. 7–8). The court asked petitioner whether he wished to say anything about the disposition of the matter and petitioner responded that he had nothing to add (R. 8). The judge then indicated that although he originally had intended to impose a jail sentence,[1] he now was disposed to learn "something more about the defendant than I have seen or heard up to date" (R. 8). Accordingly, the petitioner was sentenced under the provisions of 18 U.S.C. 4208(b) (R. 8–9). On the same date, April 9, 1962, a formal judgment was entered reciting that the defendant was adjudged guilty as charged and that "the defendant is hereby committed to the custody of the Attorney General or his authorized representative under the provisions of Title 18, U.S.C. Section 4208(b)" (R. 14).

On July 16, 1962, after studying the report from the Bureau of Prisons, the court, with the petitioner and counsel present, suspended imposition of sentence and placed the petitioner on probation for two years (R. 11, 13; Pet. Br. 11–12).

On July 19, 1962, petitioner filed a notice of appeal (R. 11, 9–10). The court of appeals, on the government's motion, dismissed the appeal as untimely,

[1] Later, the judge added that his inclination toward a prison sentence had been influenced by his conviction "without the slightest doubt, that a perjured defense was offered in the defense of this defendant" (R. 9).

holding that the time for appeal ran from the entry of judgment on April 9, 1962 (R. 19–20).

ARGUMENT

INTRODUCTION AND SUMMARY

The normal course of criminal appeals is, of course, well established. After the verdict or finding of guilty, the defendant is given five days in which to ask for a new trial or file a motion in arrest of judgment. Rules 33, 34, Federal Rules of Criminal Procedure. Pending sentence, he may be enlarged on bail. Rule 32(a). Thereafter, "[s]entence shall be imposed without unreasonable delay." Rule 32(a).[1] A judgment of conviction (which includes the sentence) is then signed and entered, Rule 32(b), and the appeal must be noted within the following ten days, Rule 37(a)(2), no enlargement of that period being allowed. Rule 45(b). Unless the time is extended, the record must be filed with the appellate court and the appeal docketed within 40 days thereafter, Rule 39(c), and, after allowing time for preparing briefs and argument, the appeal is heard "as soon * * * as the state of the calendar will permit," in preference to civil cases. Rule 39(d). Pending decision on appeal, a sentence of imprisonment is stayed, unless the defendant elects otherwise. Rule 38(a)(2). Instead of being committed to the custody of the Attorney General for assignment to a jail or penitentiary (see

[1] With obvious concern for avoiding undue delay, the Criminal Rules contemplate the initiation of the pre-sentence report even before verdict. See Rule 32(c)(1).

18 U.S.C. 4082-4083), he is locally detained by the marshal or enlarged on bail. Rule 46(a)(2); 18 U.S.C. 4086. Reconsideration of the sentence originally imposed remains open for two months after affirmance of the conviction on review. Rule 35.

These rules reflect an orderly, prompt and fair procedure. The dominant concern is, quite naturally, that the wrong be righted (if injustice has been done) as quickly as is consistent with deliberate legal process. And, because some delay is unavoidable, every proper effort is made to avoid actual imposition of punishment by staying the sentence and enlarging the defendant on bail, until the appeal is determined. The question presented here is whether, in providing a flexible sentencing procedure under which the trial judge may obtain the benefit of a thorough diagnostic study of the prisoner to enlighten his ultimate decision on the appropriate sentence, Congress, disregarding the usual considerations, meant to alter, for those cases in which the provision is invoked (albeit over the defendant's objection), the carefully drawn rules applicable to every other case by imposing a mandatory period of imprisonment[*] of three or six months before the appellate process can begin.

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[*] As we point out below, in practical operation, Section 4208(b) requires actual incarceration in order to enable the prison authorities to complete their report, which is based, in important part, on observing the convict under prison conditions. Thus, if the right to appeal matures only on re-sentencing after the court has received and considered the report, execution of the original sentence cannot be stayed, nor can the defendant be enlarged on bail, until the ultimate sentence is entered.

Constitutional difficulties aside, such a conclusion is not lightly to be inferred. Nothing compels it; on the contrary, everything points the other way. In our view, the scheme of the statute and its legislative history indicate that no deviation from the usual practice was intended. Nor do notions of finality of judgment require a postponement of the right of appeal beyond the normal delays after conviction. Indeed, looking further to the consequences of the rule urged by petitioner, we submit no different answer is consistent with the fair and orderly administration of criminal justice.

WHEN THE PROCEDURES OF SECTION 4208(b) OF THE CRIMINAL CODE ARE INVOKED, THE TIME FOR APPEAL RUNS FROM THE ORIGINAL IMPOSITION OF SENTENCE

A. THE SCHEME OF THE STATUTE AND ITS LEGISLATIVE HISTORY INDICATE THAT CONGRESS INTENDED THE APPEAL TO BE TAKEN FROM THE JUDGMENT EMBODYING THE INITIAL SENTENCE

The pattern of Section 4208 is to permit, in the discretion of the judge, recourse to penological studies and to a variety of individualized procedures for release.[4] Subsection (a), *supra*, p. 2, provides that "[u]pon entering a judgment" the judge may (1) set a date for eligibility for parole which is less than the

[4] For the historical background, see the government's brief in *United States* v. *Behrens*, No. 86, this Term, pp. 15–26, which deals with the question of whether a defendant must be present when sentence is imposed after the period of incarceration. Also, Glueck, *Principles of a Rational Penal Code*, 41 Harv. L. Rev. 453, 460–461; Judge Boldt, *Recent Trends in Criminal Sentencing*, 27 Federal Probation, March 1963, pp. 3–6; Judge Kaufman, *Enlightened Sentences Through Improved Technique*, 26 Federal Probation, September 1962, pp. 3, 6.

normal one-third of the term (see 18 U.S.C. 4202), or (2), set a maximum sentence and allow the board of parole to determine when the offender shall be eligible for parole (18 U.S.C. 4208(a)(2)). The final method is that provided in 18 U.S.C. 4208(b), invoked here. Under this subsection the maximum sentence is imposed subject to later revision by the judge.[5] In each case, a diagnostic study of the offender is made in a penal institution by the experienced personnel of the Bureau of Prisons, as provided in 18 U.S.C. 4208(c). The pertinent difference between subsection (a) and subsection (b) is that the latter permits the judge, rather than the board of parole, to evaluate the report of the prison authorities and adjust the sentence accordingly. No one doubts that where the parole board fixes the release date the time for appeal runs from the original imposition of sentence. The question here is whether a different rule governs when it is the judge himself who reconsiders the sentence after diagnostic study.

There is no reason to think so. Every indication is that Congress intended the normal practice to be followed in both cases. The text itself points in that direction. The procedures of Section 4208(b) are invoked only after a "judgment of conviction", which necessarily embodies a "sentence" (see Rule 32(b), F.R. Crim. P.), has been entered.[6] The defendant is

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[5] These provisions do not apply to offenses where mandatory penalties are provided. 72 Stat. 847. See *Robinson* v. *United States*, 313 F. 2d 817 (C.A. 7); *Rivera* v. *United States*, 318 F. 2d 606, 609 (C.A. 9).

[6] While the words "Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public re-

committed "to the custody of the Attorney General," as in the case of all sentenced prisoners (see 18 U.S.C. 4082), for a period "deemed to be for the maximum sentence of imprisonment prescribed by law." And it is provided that "The term of the sentence shall run from date of original commitment under this section." These explicit references to the language of sentence and judgment are instructive. They might easily have been avoided. Thus, it might have been provided that, upon determining to utilize the technique now made available, the judge would "defer sentencing" and "remand the prisoner for observation," to be returned for sentencing when the report was received. It is plain Congress chose its words advisedly to convey that the initial commitment was sufficiently "final" to support an immediate appeal.

The legislative history of Section 4208(b) does not directly discuss the question of when to take an appeal. However, the background of the statute (which is discussed in detail in the government's brief in the companion case of *Behrens*, No. 86, O.T. 1963, pp. 15–26) indicates that Congress deemed the initial sentence to be the judgment concluding the criminal case and that any subsequent change in the sentence was viewed as comparable to a reduction of sentence under Rule 35 which would not affect the finality of the original judgment.

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quire that the defendant be sentenced to imprisonment for a term exceeding one year, may * * *" appear in subsection (a), and are not repeated for subsection (b), it is plain they serve as an introduction to the whole of Section 4208.

The original suggestion by the Judicial Conference subcommittee, it is true, described the original commitment as a "tentative" sentence.[7] But, significantly, that descriptive term was eliminated. While the legislative history provides no explanation, the deletion reveals a concern to emphasize that the original sentence was a definite and binding sentence. One may reasonably assume that Congress wished to make sure that the original sentence would support an appeal.[8] That conclusion is reinforced by the fact that, at the same time, Congress added the concluding sentence of Section 4208(b): "The term of the sentence shall run from date of original commitment under this section". Again, it seems to be saying: Since such a sentence is sufficient to support an actual commitment to a penitentiary for "service" of the sentence, it qualifies as a final judgment to support an appeal.

There is no contrary indication in the addition of the explicit alternative given to the trial judge to "affirm the sentence of imprisonment originally imposed." The historical explanation for this change is probably to be found in the traditional fear of the judiciary that it was abdicating its responsibility for

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[7] See proposal set out in the government's brief in *Behrens*, No. 86, O.T. 1963, pp. 22-23.

[8] The references to a "tentative" sentence found in the legislative history stem from the original proposal of the Judicial Conference subcommittee and not the bill that was passed. (See Federal Sentencing Procedure, Hearing before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 85th Cong., 2d Sess., on H.J. Res. 425, p. 39.) In light of the subsequent deletion, petitioner's reliance on these expressions is misplaced.

sentencing to the executive (see government's brief in *Behrens*, No. 86, this Term, p. 18). The explicit reference to "affirm" may have been deemed necessary to spell out the full freedom of action to continue the maximum sentence, instead of granting reduction or probation. In any event, the mere affirmance of a previously imposed sentence adds nothing for appellate review. If anything, it confirms the government's view that the original commitment was a sentence; otherwise something more than a mere "affirmance" would be necessary to impose a binding sentence.

At all events, the legislative history is clear that section 4208(b) was proposed as an extension of the 60 day period for reduction of a sentence under Rule 35 of the Federal Rules of Criminal Procedure. See the government's brief in *Behrens*, No. 86, this Term, pp. 22-25.[9] Under that rule, the ten day period for taking an appeal runs from the original judgment.[10]

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[9] As we show there, the legislative history is explicit in not requiring a defendant's appearance in court for reduction in sentence. As there explained (pp. 7-8), these questions are closely allied. In view of the requirements of allocution prior to sentence (Rule 32(a)) and the requirement of advising a non-represented defendant of his appellate rights when sentence is imposed (Rule 37(a)(2)), it is difficult to assume that Congress means this subsequent review of sentence, in the absence of the defendant, to qualify as the traditional keystone marking the beginning of the ten day period for perfecting an appeal.

[10] There have been unsuccessful attempts to perfect a direct appeal from a conviction, where a sentence has been reimposed upon revocation of probation, *United States* v. *Steiner*, 239 F. 2d 660, 661 (C.A. 7), certiorari denied, 353 U.S. 936, or where sentence has been imposed for the first time on revocation of probation from a suspended sentence. *Bernal-Zasueta* v. *United States*, 225 F. 2d 64, 68 (C.A. 9).

Indeed, Rule 35 expressly contemplates reduction of sentence after affirmance on appeal or denial of a petition for a writ of certiorari. Thus, the analogy which Congress itself drew to the Rule 35 procedure strongly suggests that it viewed the original sentence under Section 4208(b) as the final judgment for the purpose of appeal, with the concomitant right of a defendant to have bail and be at liberty until the conviction is affirmed.[11]

B. THE INITIAL COMMITMENT QUALIFIES AS A "FINAL JUDGMENT" FOR PURPOSES OF APPEAL

We have shown that Congress strained to provide an initial judgment that would support an appeal. Petitioner argues, however, that, regardless of what was intended, the original sentence is too "tentative" to qualify as an appealable "final judgment." See 28 U.S.C. 1291. We might answer that the Congressional will must be given effect, if need be, by varying the traditional rule of finality for Section 4208(b) cases. But the fact is that the initial judgment entered fully satisfies the usual requirement of finality for appeal. Petitioner's argument is fallacious: it confuses finality of sentence with "finality of judgment."

[11] Of course, where a defendant does not post bail but elects to commence service of sentence pending appeal, there is no reason why the diagnostic study should not be made during the period of incarceration, and redetermination of the sentence can probably proceed even though the case is on appeal. Modifications of sentences have in fact been made under Section 4208(b) while the case was on appeal. See *United States* v. *Varner*, 283 F. 2d 900, 901 (C.A. 7); *Armstrong* v. *United States*, 306 F. 2d 520, 521, fn. 1 (C.A. 10). But see, *Berman* v. *United States*, 302 U.S. 211, 214.

There is no question but that, under the express provisions of Section 4208(b), the district judge must do something further (Pet. Br. 6) after originally imposing the maximum sentence, if it is only to affirm it. But the existence of a power to revise sentence does not alter the fact that the whole process of adjudication of guilt is terminated by the initial maximum sentence. The right of appeal need not wait longer.

Finality for purposes of appeal has long been recognized as "an historic characteristic of federal appellate procedure". *Cobbledick* v. *United States*, 309 U.S. 323, 324. In the criminal law, this doctrine of finality finds expression in the phrase "Final judgment in a criminal case means sentence. The sentence is the judgment" *Berman* v. *United States*, 302 U.S. 211, 212; *Miller* v. *Aderhold*, 288 U.S. 206, 210; *Hill* v. *Wampler*, 298 U.S. 460, 464. But, as the Court explained in *Korematsu* v. *United States*, 319 U.S. 432, 434:

> The "sentence is judgment" phrase has been used by this Court in dealing with cases in which the action of the trial court did not in fact subject the defendant to any form of judicial control. * * * But certainly when discipline has been imposed, the defendant is entitled to review.

The requirement that the cause be terminated by sentence is designed to make certain that the conviction on the merits which is subject to appellate review stands up against various possible pre-sentence remedies such as a motion for new trial, or in arrest of

judgment. To the extent that the conviction may be upset it is still "tentative" and therefore not appropriate for appellate review. See *Cohen* v. *Beneficial Loan Corporation,* 337 U.S. 541, 546. This policy has found expression in the Rules, which specifically provide for the inclusion of a sentence as part of the judgment from which review is to be taken. Rules 32(b) and 37(a)(2),[12] F.R. Crim. P. There is no suggestion, however, that the sentence itself is subject to review. The reduced sentence as such adds nothing for appellate review since the extent of punishment for criminal offenses (within statutory and constitutional limits) is not subject to modification on appeal. *Herman* v. *United States,* 289 F. 2d 362, 369 (C.A. 5), certiorari denied, 368 U.S. 897; *Smith* v. *United States,* 273 F. 2d 462 (C.A. 10), certiorari denied, 363 U.S. 846; See *Gore* v. *United States,* 357 U.S. 386, 393.

The original sentence in this case, which started the term of petitioner's sentence and which in fact subjected the defendant to penitentiary confinement, fully satisfied the standard of finality. A jury had found petitioner guilty, a full probation report had been submitted, counsel had been heard on sentencing, the petitioner had been afforded allocution, the judge had pronounced sentence, a judgment had been entered and petitioner had been physically committed. The time was ripe for review because the litigation between the parties had terminated on the merits.

[12] See long list of citations supplied by Judge Learned Hand in *United States* v. *Lecato,* 29 F. 2d 694, 695 (C.A. 2).

It can make no difference that the judge was going to review the sentence at a later date. Cf. *St. Louis, Iron Mountain & Southern Railroad Co.* v. *Southern Express Co.*, 108 U.S. 24.[13]

C. FAIRNESS TO THE CONVICT REQUIRES THAT HE BE PERMITTED TO APPEAL FROM THE JUDGMENT EMBODYING THE INITIAL SENTENCE

Whatever doubt remains as to the purpose of Congress is surely dispelled by considering the consequences of following the rule suggested by petitioner. Although the present claimant would have it otherwise, fairness to defendants in general requires recognizing their right to test a conviction by appeal immediately after the initial judgment. Congress can have wished no other result.

Like petitioner, we assume that there can be only one appeal from the adjudication of guilt and that the time for appeal begins to run as soon as the right matures. Thus, if petitioner is correct, the convicted defendant for whose case the judge invokes the procedures of Section 4208(b), albeit over his objection, has no choice but to wait three to six months before initiating review of his conviction. That result is

[13] The only decision in addition to that below which directly discusses the problem of the time for appeal is *United States* v. *Behrens*, 190 F. Supp. 799 (S.D. Ind.), where the court held untimely an attempted appeal by *Behrens* (the same defendant involved in No. 86, this Term). Petitioner misinterprets (Pet. Br. 13) the government's position in *Grabina* v. *United States*, 369 U.S. 426. The fatal flaw in that case was not that final sentence was deferred, but that both the original commitment and ultimate sentence were imposed in the absence of the defendant, so that there was a violation of Rule 43, F.R. Crim. P. No such problem is presented by this case.

at variance with the policy favoring prompt appeals in criminal cases, and, more important, it is plainly unfair to the defendant who has been wrongly convicted. The matter would be in a different light if the procedure were optional—if it permitted the defendant to choose the benefit of the investigative study, with the attendant delays, or allowed him to appeal immediately or after re-sentencing, as he wished. But the statute grants no options: the defendant's consent to utilization of the provision is not required, nor is there any suggestion that he may elect when to appeal. Under petitioner's reading, he *had* to wait until a "final" sentence was imposed.

Nor is this all. The enlightened rule of our criminal law is that execution of a sentence will be stayed pending appeal and that the defendant will be enlarged on bail until his case is determined by the appellate court. See Rules 38(a), 46(a)(2). If petitioner is right, that cannot happen when Section 4208(b) is invoked. Not only must the convict wait to test his conviction, but he must wait in the penitentiary. The reason is that the report on the basis of which a redetermination of sentence is made must be completed by the prison authorities, on the basis of examinations, interviews and observations made at the prison. Obviously, this is incompatible with local detention in the custody of the marshal or with enlargement on bail.

These considerations, we submit, compel the conclusion that the usual rule obtains: the right to appeal matures and the time for appeal begins to run from the judgment of conviction which incorporates the

initial sentence. It is no answer to say that the convict's decision whether to appeal may depend on the severity of the sentence ultimately imposed. This very case (in which the sentence was reduced from a long term of years to probation) illustrates how rarely that consideration is determinative. When it is, the defendant can probably note his appeal immediately, elect to begin serving his sentence, see Rule 38 (a)(2), so as to permit the investigative study to be made, and, upon re-sentencing, abandon the appeal if the original sentence is then so reduced as to render further prosecution of the appeal not "worthwhile." More often, the exercise of the right of appeal will not, as it should not, depend on the length of the sentence, or the probability of its being reduced.

In a real sense, the ultimate determination of the sentence actually to be served usually occurs after affirmance of the conviction. Whether made by the prison authorities through allowances for "good time" (18 U.S.C. 4161–4162), by the parole board (18 U.S.C. 4202–4203, 4208(a)), or by the sentencing judge pursuant to a reduction of sentence under Rule 35 or by redetermination under Section 4208(b), the question of punishment is properly discrete from the issues on appeal from the conviction. The short of it is that the avenue of appeal is designed for those who are innocent or have been convicted without a fair trial. Section 4208(b)—a statute designed for rehabilitation of offenders—should not and cannot be construed to

require one who asserts his innocence to spend months in a penitentiary under the surveillance of penologists before initiating an appeal.'

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be affirmed.

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